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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 * * *

8 Michael Hicks,

9 Plaintiff,

10 v.

11 C.P. Squires Elementary School, et al.,

12 Defendants.
13

Case No. 2:19-cv-01665-GMN-BNW

SCREENING ORDER

14 Before the court is Plaintiff Michael Hicks' amended complaint. ECF No. 22. Plaintiff
15 brings four claims based on events that allegedly occurred while he was employed at C.P. Squires
16 Elementary School. *Id.* The Court has already granted his request to *proceed in forma pauperis*.
17 ECF No. 15. The Court will proceed to screen his amended complaint. 28 U.S.C. § 1915(e)(2).

18 **I. Screening standard**

19 Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint
20 under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable
21 claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may
22 be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
23 § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard
24 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668
25 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient
26 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *See Ashcroft*
27 *v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and may only
28 dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in support of

1 his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir.
2 2014) (quoting *Iqbal*, 556 U.S. at 678).

3 In considering whether the complaint is sufficient to state a claim, all allegations of
4 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylor*
5 *Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
6 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
7 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
8 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*
9 Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se
10 plaintiff should be given leave to amend the complaint with notice regarding the complaint’s
11 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

12 **II. Screening the complaint.**

13 **a. Factual background.**

14 Hicks alleges that he was employed as a custodian at C.P. Squires Elementary School (the
15 “School”). ECF No. 22. He alleges he was qualified for this job (given he had similar job
16 responsibilities when employed by McDonald’s), was interviewed for the custodian position after
17 being asked about job responsibilities, was hired, and never received write ups prior to his EEOC
18 complaint. *Id.* He describes himself as an African American Black male. *Id.* Hicks brings his
19 claims against the School, Barry Bosacker (the School’s principal), and Joaquin Landeros
20 (Hicks’s custodial supervisor). *Id.* He alleges neither Bosacker nor Landeros are Black males.

21 Hicks claims that a weight room was created in the school by placing workout equipment
22 into a classroom. *Id.* According to Hicks, around April 2019, he was informed that he was
23 permitted to use the newly created weight room. *Id.*

24 Hicks alleges that on May 9, 2019, he was using the weight room when Dickson
25 approached him and “made a comment . . . in regards to [Hicks’s] physical appearance, body, and
26 health.” *Id.* The following day, Landeros informed Hicks that he was no longer permitted to use
27 the weight room. *Id.* Landeros supposedly told Hicks that several teachers saw Hicks using the
28 weight room, and those teachers informed Bosacker that they did not like this. *Id.* Bosacker, in

1 turn, instructed Landeros to instruct Hicks that he was no longer permitted to use the weight
2 room. *Id.* Other custodians, such as Kent Dickson and Rafael Ledesma, were allowed to continue
3 using the weight room and did so. *Id.* Neither Dickson nor Ledesma are Black males.

4 Hicks filed a complaint with the EEOC on the same day he was proscribed from using the
5 weight room. *Id.* Later, on May 30, 2019, Hicks claims he began to be harassed by Landeros and
6 Bosacker. *Id.* That is, he started having several complaints about his work (while he had never
7 had any write ups before filing his complaint with the EEOC). He also started receiving more
8 work assignments compared to the other non-Black custodians. In addition, Landeros continued
9 taunting him about the fact that Landeros could still use the weight room. *Id.*

10 Hicks now seeks both injunctive relief (for corrective measures precluding similar
11 situations from taking place in the future) and compensatory damages. *Id.*

12 **B. Discussion.**

13 Hicks brings three claims: (1) race and color discrimination in violation of Title VII; (2)
14 race and color discrimination in violation of NRS 613.330; and (3) retaliation in violation of Title
15 VII.

16 **1. Race discrimination**

17 Title VII makes it “an unlawful employment practice for an employer . . . to discriminate
18 against any individual with respect to his compensation, terms, conditions, or privileges of
19 employment, because of [his] . . . race [or] color.” 42 U.S.C. § 2000e–2(a)(1). To state a claim
20 for discrimination, a plaintiff must allege he (1) belongs to a protected class; (2) was qualified for
21 the position; (3) was subject to an adverse employment action; and (4) similarly situated
22 individuals outside his protected class were treated more favorably or that a discriminatory reason
23 motivated the employer. *Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 690-91 (9th Cir. 2017)
24 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Claims for unlawful
25 discrimination under NRS 613.330 are analyzed under the same principles applied to Title VII
26 claims. *Samuels v. We’ve Only Just Begun Wedding Chapel, Inc.*, 154 F. Supp. 3d 1087, 1093
27 (D. Nev. 2015) (citing *Apeceche v. While Pine Co.*, 615 P.2d 975, 977–78 (Nev. 1980)).
28

1 Here, Hicks sufficiently pleads a claim for race discrimination under Title VII and NRS
2 613.330. To begin, Hicks's allegations meet the first element because, according to the complaint,
3 he is Black and African American. These characteristics make him part of a protected class.

4 Hicks's allegations meet the second element as he explains he had similar responsibilities
5 at his prior place of employment (McDonald's), was hired for this position after being
6 interviewed about job responsibilities, and had never been written up for failure to perform his
7 job duties prior to his EEOC complaint.

8 Hicks seems to maintain that the adverse employment action he suffered was not being
9 able to use the weight room. For discrimination claims, an adverse employment action "is one
10 that 'materially affect[s] the compensation, terms, conditions, or privileges' of employment.
11 *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir.2008). For screening purposes, the Court
12 finds that this allegation sufficiently meets the third element.

13 Hicks meets the fourth element, as he alleges Landeros and Bosacker proscribed him from
14 the using the weight room because of his race, while allowing other non-Black custodians to
15 continue using it.

16 Accordingly, the Court will allow Hicks' claims for racial discrimination under Title VII
17 and NRS 613.330 to proceed.

18 **2. Color discrimination**

19 While Plaintiff alleged facts to support a claim for racial discrimination, he did not allege
20 facts that would support discrimination on the basis of color. "Color discrimination arises when
21 the particular hue of the plaintiff's skin is the cause of the discrimination, such as in the case
22 where a dark-colored African-American individual is discriminated against in favor of a light-
23 colored African-American individual." *Williams v. Alhambra Sch. Dist. No. 68*, 234 F. Supp. 3d
24 971, 981 (D. Ariz. 2017) (quoting *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 n.5 (4th Cir.
25 2002)). The EEOC defines color discrimination as "when a person is discriminated against based
26 on the lightness, darkness, or other color characteristic of the person." EEOC Compliance Manual
27 § 15-III, What is "Color" Discrimination, 2006 WL 4673426, at *1 (June 1, 2006). Based on
28 what Plaintiff alleged, the discrimination he suffered was a result of his race—not the lightness or

1 darkness of the color of his skin. Therefore, Hicks’s color discrimination claim is dismissed
2 without prejudice.

3 3. Retaliation

4 To make out a prima facie case of retaliation, plaintiffs must show that (1) he “undertook
5 a protected activity under Title VII,” (2) defendants subjected him to an adverse employment
6 action, and (3) there exists “a causal link between the two.” *Vasquez v. Cty. of Los Angeles*, 349
7 F.3d 634, 646 (9th Cir. 2003). Protected activities under Title VII include opposing allegedly
8 discriminatory acts by one’s employer. *Id.*; *see also* 42 U.S.C. 2000e–3(a).

9 Here, Hicks’s retaliation claim fails because he does not sufficiently allege the third
10 element.

11 Regarding the first element, it is a protected activity under Title VII to file a complaint
12 with the EEOC. Hicks first alleges that he complained of the above conduct by filing a claim with
13 the EEOC. As a result, the first element is met.

14 Hicks’s allegations meet the second element, too. He alleges that after he complained with
15 the EEOC, he started getting additional work—while other non-Black custodians were not
16 subjected to an increased workload. In addition, he started receiving complaints about his job
17 performance, which had never been the case in the past.

18 Turning to the third element, as explained in the previous order by this Court, the plaintiff
19 must allege sufficient facts to show a “but-for” causal link between the protected activity and the
20 adverse employment action. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360
21 (2013). Thus, plaintiff must show that the individuals who allegedly effected the retaliation were
22 “**aware that the plaintiff [] engaged in protected activity.**” *Raad v. Fairbanks North Star*
23 *Borough School Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (emphasis added).

24 Here, this means that Hicks must allege that the persons who retaliated (e.g., Landeros or
25 Bosacker) did so **because of** Hicks’s decision to file a charge of discrimination with the EEOC.
26 Under *Raad*, this mean that Hicks must truthfully allege that his retaliators were aware of his
27 decision to file a complaint with the EEOC. Hicks has still not done this. Without this knowledge,
28 Landeros or Bosacker could not have retaliated against Hicks “because he . . . opposed any

1 practice made [] unlawful” under Title VII. *See* 42 U.S.C. § 2000e-3(a). Therefore, Hicks’s
2 retaliation claim is dismissed without prejudice.

3 **III. Conclusion**

4 IT IS THEREFORE ORDERED that Plaintiff’s racial discrimination claims under Title
5 VII and NRS 613.330 may proceed.

6 IT IS FURTHER ORDERED that Plaintiff’s claim for color discrimination is dismissed
7 without prejudice.

8 IT IS FURTHER ORDERED that Plaintiff’s claim for retaliation is dismissed without
9 prejudice.

10 IT IS FURTHER ORDERED that if Plaintiff wishes to amend his color discrimination
11 and/or retaliation claims, he must do so by February 26, 2021. Plaintiff is further advised that if
12 he chooses to amend his complaint, the Court will screen it again before it may be served. After it
13 is screened, Plaintiff may serve it himself or file a motion for service.

14 IT IS FURTHER ORDERED that Plaintiff is advised that if chooses *not* to amend his
15 complaint, he may serve it himself on defendants or file a motion for service.

16 DATED: January 20, 2021.



17
18 BREND A WEKSLER
UNITED STATES MAGISTRATE JUDGE